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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re R.F., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. R.F., Defendant and Appellant.	A146082 (City & County of San Francisco Super. Ct. No. JW126300)

Appellant R.F. appeals from a judgment in juvenile delinquency proceedings declaring him to be a ward of the court and placing him on probation with various conditions, including conditions subjecting to search, upon demand, any electronic or digital devices in his possession, and directing him to turn over to his probation officer and to law enforcement officers, upon demand, all passwords to such devices. The sole issue raised in this appeal is a challenge on constitutional grounds to the electronic search conditions. We reject that challenge and affirm.

I. BACKGROUND

A. 2012 Offenses and Wardship Petitions

On August 21, 2012, appellant, age 15, chest-butted a fellow student and

threatened to shoot his brother. The victim was so intimidated that he transferred to another school. Relatives of appellant and the victim were in rival gangs. Appellant denied being in a gang, but admitted that his cousins were from "Double Rock," and one cousin had been "killed." Following the chest-butting incident, on August 23, 2012 the District Attorney filed an original wardship petition (Welf. & Inst. Code, § 602) charging appellant with making criminal threats (Pen. Code, § 422) (count 1) and battery (Pen. Code, § 243.2) (count 2).[1] On August 29, appellant was released to his mother's custody after agreeing to certain conditions and agreeing to participate in various programs through the Detention Diversion Advocacy Program (DDAP). (Welf. & Inst. Code, § 628.1.)

On October 18, 2012, witnesses saw and videotaped appellant approach a group of students, pick up a male student, and throw him to the ground, causing serious injury to his face and head. On October 31, 2012, the District Attorney filed a second wardship petition, this time alleging that appellant committed aggravated assault by inflicting great bodily injury on another student. (Pen. Code, § 245, subd. (a)(4).) Appellant, who had been detained in juvenile hall after the incident, was nonetheless released again to his mother on November 7 and permitted to continue his participation in the DDAP.

On December 13, 2012, the police saw appellant in a public housing area take something from his waistband and dispose of it in a recycling bin. It turned out to be a concealed firearm. When the police approached appellant, he fled. The officers retrieved the gun, which was loaded. During booking, police found a pill in appellant's pocket that tested preliminarily as Ecstasy, and they discovered an electronic device appellant was carrying contained photographs of him and his cohorts holding handguns and flashing gang signs. The disposition report filed on January 8, 2013, said that appellant had acknowledged he was a member of the

[1] Appellant was arrested in 2011 for robbery and conspiracy to commit robbery of a woman on a bus, but the matter was ultimately dismissed without a declaration of wardship.

"Sunnydale" or "Up the Hill" gang.

On December 17, 2012, a third wardship petition alleged that appellant carried a loaded firearm (Pen. Code, § 25850, subd. (a)) (count 1), carried a concealed firearm on his person (Pen. Code, § 25400, subd. (a)(2)) (count 2), and possessed methamphetamine while armed with a loaded gun (Health & Saf. Code, § 11370.1, subd. (a)) (count 3). On December 19, appellant admitted committing criminal threats (count 1 in the original petition), and both weapons allegations (counts 1 and 2 in the third petition), in exchange for dismissal of the second petition and remaining counts in the first and third petitions. At a contested dispositional hearing on January 28, 2013, the juvenile court declared appellant a ward of the court and placed him in the care and custody of the probation department, to be committed to the six-month program at Log Cabin Ranch (LCRS).

B. 2013–2014 Probation Violations

A progress review of appellant's performance at LCRS in April 2013 noted his mother's concern about his "affiliat[ion]" with "the TRE-4 gang." While at LCRS, appellant and several others were alleged to have tampered with another minor's water bottle by urinating in it. Based on this incident, appellant was expelled from the LCRS program. On June 17, 2013, a notice of probation violation (Welf. & Inst. Code, § 777) alleged that appellant was terminated from LCRS. At disposition on July 12, the court sustained the probation violation, continued appellant as a ward, and committed him to the care and custody of the probation department, for placement in a group home. On July 30, appellant was placed at Mary's Help group home (Mary's Help) in Vallejo.

On February 7, 2014, appellant absconded from Mary's Help. Shortly thereafter, he was terminated from Mary's Help and a warrant issued for his arrest. On June 13, appellant, age 16, was taken into custody on the outstanding arrest warrant and the warrant was recalled. At a placement hearing (Welf. & Inst. Code, § 737) on July 1, the juvenile court reinstated appellant on probation and ordered that

he be placed at Boy's Republic in Southern California.

On November 26, 2014, appellant graduated high school and successfully completed Boy's Republic. On December 5, the juvenile court placed appellant on home probation with various terms and conditions, including GPS monitoring.

C. 2015 Petitions and Probation Violations

On March 10, 2015, plainclothes officers arrested appellant and several others on gun possession charges. A search of the vehicle they were riding in yielded three handguns, including one that appeared to be an assault rifle with an extended magazine. Photos found on cell phones confiscated in the arrest showed appellant "in possession of a firearm or something that looked like a firearm/weapon, could be used as a firearm/weapon, or could reasonably be considered to be a firearm/weapon." On March 13, 2015, a new notice of probation violation alleged that appellant was in possession of a firearm. The trial court released appellant on home detention, with orders not to possess any weapons.

On July 3, 2015, a probation search of appellant took place at his home. A Glock 27 .40 caliber firearm was found on his person. A few days later, the District Attorney filed a fourth wardship petition, this time alleging that appellant, age 17, carried a concealed stolen firearm (Pen. Code, § 25400, subds. (a)(2) & (c)(2)) (count 1), carried a concealed firearm where he was not the registered owner and the gun had a large capacity magazine (Pen. Code, § 25400, subds. (a)(2) & (c)(6)(A) & (B)) (count 2), carried a stolen, loaded firearm (Pen. Code, § 25850, subds. (a) & (c)(2)) (count 3), carried a loaded firearm where he was not the registered owner (Pen. Code, § 25850, subds. (a) & (c)(6)) (count 4), possessed a firearm as a minor (Pen. Code, § 29610) (count 5), and possessed a large capacity magazine (Pen. Code, § 32310, subd. (a)) (count 6).

Prior to the hearing on these charges, his probation officer submitted a report stating that because R.F. "has a high level of criminal sophistication[,] . . . Out of Home Placement should not be considered as an option in that [appellant] has many

weapon related circumstances around his detention which elevates the risk level in a residential unlocked facility." Due to gang threats against him, the probation officer stated, "[he] is not safe in the community nor is he safe for the community at this juncture of his life." The probation officer then recommended as follows: "With the advancement in technology through the internet, social media has become an instrument to facilitate crimes, and to communicate with victims, witnesses and accomplices/associates. Access to [appellant's] digital electronic devices and social media accounts may be necessary to check for continued criminality. Therefore it is recommended that the court impose the disclosure of passwords for digital/electronic devices . . . [¶] . . . [and that] any digital or electronic device in [appellant's] possession or control is subject to search at any time by a probation officer and law enforcement officers/peace officers on demand without warrants or suspicion."

On July 16, 2015, appellant admitted counts 2 and 6 in exchange for dismissal of the remaining counts and the pending probation violation petition. At a contested dispositional hearing in August 2015, appellant's probation officer testified that appellant was believed to be a member of the "Tray 4" gang from Sunnydale Housing. The court continued appellant, by then age 18, as a ward of the court, reinstated probation, and committed him to a year in juvenile hall. The court also imposed various terms and conditions of probation on appellant, including gang terms, a warrantless search condition, and, on the recommendation of his probation officer, in light of his history, the following electronic search conditions: (1) "That [appellant] disclose passwords for digital devices in his possession or control and for his social media accounts to probation officer and law enforcement officers/peace officers on demand without warrants or suspicion"; and (2) "That any digital or electronic device in [appellant's] possession or control is subject to search at any time by a probation officer and law enforcement officer/peace officers on demand without warrants or suspicion."

Appellant filed a timely notice of appeal.

II. DISCUSSION

Appellant challenges the electronic search conditions imposed on him on the grounds that they are (1) not related to his past or future criminality and therefore violate the rule of *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), and (2) they infringe on his constitutional rights of privacy and expression and are unconstitutionally overbroad, both on their face and as applied.

Juvenile courts have broad discretion in establishing conditions of probation. "The court may impose 'any . . . reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' " (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 940, citing Welf. & Inst. Code, § 730, subd. (b).) We review the juvenile court's probation conditions for abuse of discretion. (*In re P.A.* (2012) 211 Cal.App.4th 23, 33.)

The juvenile court's discretion is not unlimited, however. The Supreme Court in *Lent* set forth three criteria for assessing the validity of a condition of probation: "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*Lent, supra*, 15 Cal.3d at p. 486.) The *Lent* test applies as well to conditions of juvenile probation. (*In re D.G.* (2010) 187 Cal.App.4th 47, 52–53.) The test is framed in the conjunctive, so all three criteria must be absent before a condition of probation will be deemed unreasonable under *Lent*. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) Accordingly, a condition of probation that forbids or requires conduct which is not itself criminal is valid only if that conduct is reasonably related either to the crime of which the defendant was convicted or to future criminality. (*Lent, supra*, 15 Cal.3d at p. 486; *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084.)

Even where the *Lent* test is satisfied, "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In*

re Sheena K. (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) Under *Sheena K.*, we are empowered to entertain facial overbreadth challenges to the language of a probation condition, whether or not objection was interposed in the trial court, and our review is de novo. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 886–889.)

The courts of appeal have published a welter of recent opinions addressing constitutional challenges to electronic search conditions in juvenile probation cases under *Lent* and *Sheena K.*[2] These cases are not entirely uniform in their approach, but in general most have upheld the challenged electronic search conditions under *Lent*, while many have invoked *Sheena K.* and either imposed narrowing language on appeal or remanded with instructions that the juvenile court should craft narrowing language.

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[2] Every division of this court has weighed in, with the Supreme Court granting review in five of the cases (*In re Ricardo P.* (2015) 241 Cal.App.4th 676, 679–680, review granted February 17, 2016, S230923 [Division One]; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted and briefing deferred March 9, 2016, S232240 [Division One]; *In re P.O.* (2016) 246 Cal.App.4th 288 [Division One]; *In re Erica R.* (2015) 240 Cal.App.4th 907, 911 [Division Two]; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted and briefing deferred April 13, 2016, S232849 [Division Two]; *In re Malik J.* (2015) 240 Cal.App.4th 896 [Division Three]; *In re J.B.* (2015) 242 Cal.App.4th 749 [Division Three]; *In re A.S.* (2016) 245 Cal.App.4th 758, 761, review granted and briefing deferred May 25, 2016, S233932 [Division Four]; *In re J.E.* (2016) 1 Cal.App.5th 795 [Division Four]; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted and briefing deferred February 17, 2016, S231428 [Division Five]), as have a number of our colleagues around the state (*In re George F.* (2016) 248 Cal.App.4th 734, review granted and briefing deferred Sept. 14, 2016, appellant's motion to dismiss granted Nov. 9, 2016, S236397 [Fourth District, Division One]; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted and briefing deferred Dec. 14, 2016 [Fourth District, Division One]; *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 [Sixth District]; *People v. Appleton* (2016) 245 Cal.App.4th 717 [Sixth District].)

There is a broad consensus that the technology employed in carrying out monitoring and surveillance pursuant to these types of type of search conditions raises novel issues, as noted in a related context by the United States Supreme Court in *Riley v. California* (2014) 573 U.S.__, 134 S.Ct. 2473, 2485 ("Cell phones . . . place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to . . . [a] brief physical search" incident to arrest.). We share the concerns about privacy that many of our colleagues have expressed in addressing electronic search clauses, whether the issue is analyzed under *Lent* prong three or as a matter of overbreadth under *Sheena K*.

Content available on a probationer's electronic device or social media Web site may include intimate messages and photos, posts from other Web sites which may disclose the probationer's or the third party's political and religious affiliations, memberships in clubs or organizations, and other sensitive personal information having nothing to do with drug use or forbidden associations. Once a minor has been forced to divulge his or her passwords to a probation or police officer, the intrusion upon the minor's privacy rights is massive, though much of the information revealed would undoubtedly be unrelated to legitimate monitoring by the probation department. Data stored on electronic devices or on social media sites that may reflect criminal behavior or forbidden associations is so intermingled with other entirely unrelated private information that it is not technologically possible to segregate out the protected information from that legitimately open to view by government authorities.

But we also recognize that these privacy concerns must be balanced against a strong countervailing state interest in effective juvenile probation supervision. That state interest is two-fold. First, juvenile probation serves to protect the public by monitoring wards for future criminality. Second, juvenile wardships are designed to provide maximum opportunity for minors to turn their lives around, while satisfying the vital need to give the probation department the tools it needs to help maximize this rehabilitative goal. (See *In re Jose C.* (2009) 45 Cal.4th 534, 555 ["The purposes of

juvenile wardship proceedings are twofold: to treat and rehabilitate the delinquent minor, and to protect the public from criminal conduct. [Citations.] The preservation of the safety and welfare of a state's citizenry is foremost among its government's interests, and it is squarely within the police power to seek to rehabilitate those who have committed misdeeds while protecting the populace from further misconduct."].)

To further these goals, "the juvenile court has statutory authority to order delinquent wards to receive 'care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances.' " (*In re Charles G.* (2004) 115 Cal.App.4th 608, 615.) "All dispositional orders in a wardship case must take into account the best interests of the child and the rehabilitative purposes of the juvenile court law." (*In re S.S.* (1995) 37 Cal.App.4th 543, 550.) The basis for imposing an electronic search condition in service of the objectives of juvenile probation will sometimes be manifestly plain, given the nature of the ward's criminal record (e.g., a history of violent conduct) or the ward's particular rehabilitative needs (e.g., a history of mental illness posing risks to others). Electronic search conditions ought not to be imposed by rote, but where justified, there may in some situations be no meaningful alternative to having what amounts to an electronic window into every corner of a ward's life, at all times.

Here, the record shows a longstanding history of assaultive conduct, illegal possession of guns, gang association, and digital images found in his possession showing appellant displaying guns while in the company of others. Under any of the various approaches the appellate courts have taken, we have no difficulty rejecting the *Lent* arguments appellant advances. On this record, there is a clear connection between the electronic search conditions imposed here and the need to monitor potential future criminality of the type appellant has shown a propensity to engage in over the course of a number of years. We also see no need for *Sheena K.* narrowing. This is one of those cases, in our view, where, in the interest of public safety, on top of the always present rehabilitative interest for wards, the juvenile court was justified in concluding there was

no meaningful alternative to keeping tabs on this minor in an intensive—and unavoidably intrusive—way.

III. DISPOSITION

The judgment is affirmed

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Streeter, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.